INDEX AND SYNOPSIS OF ARGUMENT

PAGE

FACTS 1

JURISDICTION 5

QUESTIONS PRESENTED 6

SUMMARY OF ARGUMENT 7

I. The Wisconsin Supreme Court did not, and could not, decide a Federal Question, because it was limited to Review of the Record made before the State Board; and Such Record did not involve a Federal Question 7

II. Where the decision of a State Court is Based on a Non-federal Question, it is not Reviewable 14

III. No Federal Question can be Raised on the Basis of Facts not shown in the Record under review by the State Court 17

IV. Petitioner has Waived its Right to bring a Federal Question to this Court by its Conduct through which its Employees have lost their Opportunity to Pursue a Federal Remedy, if any Existed 18

CASES CITED

Alabama State Federation of Labor v. McAdory, (1945) 325 U. S. 450, 65 S. Ct. 1384, 89 L. ed. 1725 8-9

Arkansas S. R. Co. v. German Nat. Bank, (Ark. 1907) 207 U. S. 270, 28 S. Ct. 78, 52 L. ed. 201 14-15

PAGE

Baine v. J. S. Murphy, Inc., (1947) 70 N. Y. S. 2d 295 11

Binderup v. Pathe Exchange, (1923) 263 U. S. 291, 44 S. Ct. 96, 68 L. ed. 308 12

Blakeley v. Fresno Oil Co., (Tex. 1948) 208 S. W. 2d 902 11

Brown, Bonnell and Co. v. Lake Superior Iron Co., (1890) 134 U. S. 530, 33 L. ed. 1021, 10 S. Ct. 604 8

Carter v. Carter Coal Co., (1936) 298 U. S. 238, 85 L. ed. 1160, 56 S. Ct. 855 9

Clark v. Pennsylvania, (1888) 128 U. S. 395, 9 S. Ct. 113, 32 L. ed. 487 17

Consolidated Turnp. Co. v. Norfolk & O. V. R. Co., (Va. 1913) 228 U. S. 596, 33 S. Ct. 605, 57 L. ed. 982 15

Crescent Cotton Oil Co. v. State of Mississippi, (1921) 257 U. S. 129, 66 L. ed. 166, 42 S. Ct. 42 9

Damon v. Ford, Bacon & Davis, (D. C. Pa. 1945) 62 F. Supp. 446 11

Department of Treasury v. Ingram-Richardson Mfg. Co., (1941) 313 U. S. 252, 85 L. ed. 1313, 61 S. Ct. 866 9

Dred Scott v. Sandford, (1856) 60 U. S. 393, 19 Howard 393, 15 L. ed. 691 8

PAGE

Enterprise Irrigation Dist. v. Farmers Mutual Canal Co., (Neb. 1917) 243 U. S. 157, 37 S. Ct. 318, 61 L. ed. 644 15-16

Greeley v. Lowe, (1894) 155 U. S. 58, 39 L. ed. 69, 15 S. Ct. 24 8

Grignon's Lessee v. Astor, (1844) 43 U. S. 319, 2 Howard 319, 11 L. ed. 283 11

Harland Oil Co. v. Pattison, (1944) 153 P. 2d 622, 194 Okl. 570 11

Heisler v. Thomas Colliery Co., (1922) 260 U. S. 245, 67 L. ed. 237, 43 S. Ct. 83 9

Johnson v. Gr. Nat. Life Ins. Co., (Tex. Civ. App. 1942) 166 S. W. 2d 935 11

Kelly v. Ford, Bacon & Davis, (D. C. Pa. 1946) 71 F. Supp. 311 11

Kennedy v. Silas Mason Co., (D. C. La. 1946) 68 F. Supp. 576 11

Krill v. Arma Corporation, (D. C. N. Y. 1948) 76 F. Supp. 14 11

Maitrejean v. Metcalfe Construction Co., (C. C. A. Minn. 1948) 165 F. 2d 571 ..... 10, 11

National Labor Relations Bd. v. Jones & Laughlin S. Corp., (1937) 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893 9

PAGE

Oliver Iron Mining Co. v. Lord, (1923) 262 U. S. 172, 67 L. ed. 929, 43 S. Ct. 526 9

Parker v. Brown, (1943) 317 U. S. 341, 63 S. Ct. 307, 87 L. ed. 315 9

Reed v. Murphey, (C. C. A. Miss. 1948) 168 F. 2d. 257 10

Schecter Poultry Corporation v. United States, (1935) 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837 9

Schulte, Inc., D. A. v. Gangi, (1946) 328 U. S. 108, 66 S. Ct. 925, 90 L. ed. 1114 10

Snyder v. Dravis Corporation, (D. C. Pa. 1947) 6 F. R. D. 546 11

Southwestern Bell Tel. Co. v. Oklahoma, (1938) 303 U. S. 206, 58 S. Ct. 528, 82 L. ed. 751 14

Steinberg v. Steinberg, (1947) 249 Ala. 529, 32 So. 2d 209 11

Tinyes v. J. Rich Steers, Inc., (1947) 71 N. Y. S. 2d 684, 18 Misc. 106 11

Ullo v. Smith, (D. C. N. Y. 1945) 62 F. Supp. 757 11

United Mine Workers of America v. Coronado Coal Co., (1922) 259 U. S. 344, 66 L. ed. 975, 42 S. Ct. 570 9

Warren-Bradshaw Drilling Co. v. Hall, (1942) 317 U. S. 88, 87 L. ed. 83, 63 S. Ct. 125 10

PAGE

Western Indemnity Co. v. Rupp, (1914) 235 U. S. 261, 35 S. Ct. 37, 59 L. ed. 220 ..... 12-13, 18

STATUTES INVOLVED

United States Statutes

28 U. S. C. A. sec. 1257 5

28 U. S. C. A. sec. 344, note 41 14

TEXT

2 Am. Jur. 969 18

IN THE

Supreme Court of the United States

October Term, 1949

No.....

GILSON BROTHERS, a Corporation,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

Brief of Respondent Wisconsin Employment Relations Board In Opposition To Certiorari

FACTS

The decision of the Wisconsin Supreme Court of which review is sought was not based upon a federal question. The decision relied primarily, if not solely, upon grounds unrelated to the federal issues sought to be raised here. In order to bring a federal question into the case, the petitioner asserts facts which were not established by evidence in the record. The state court was limited by local law to review of the proceedings before the Wisconsin Employment Relations Board. The board's findings were not chal-

lenged and none of the evidence has been brought up in the record. The petitioner should, therefore, be limited to the facts in the board's findings which were not challenged.

The State Supreme Court was unable to consider the federal question because the petitioner did not raise it during the hearing on the merits nor offer any evidence at that time which would support its contentions if the question had been raised.

In determining whether the jurisdiction of the Supreme Court of the United States is invoked, the pertinent facts shown in the record are:

The petitioner (hereinafter referred to as the employer) discharged three of its employees on July 21 and 24, 1948 (R. 109). The labor union to which they belonged filed charges of unfair practice with the Wisconsin Employment Relations Board on July 21 and 26, based on such discharges (R. 101-102). The employer raised no federal questions in its pleadings, but filed answers with the state board asserting defenses on the merits, under the state law (R. 103-104). The board held a hearing on August 10, 1948, and received all evidence the employer offered. The employer presented a complete defense upon the merits. It did not challenge the board's jurisdiction nor present any evidence to show that the matter was not within the jurisdiction of the state board.

Both the pleadings before the board and the evidence introduced at the hearing showed that the employer is a small Wisconsin corporation operating wholly within the state (R. 108). The jurisdiction of the National Labor Relations Board has never been invoked with respect to this employer or its employees (R. 141).

On September 28, 1948, the state board issued its order finding the employer to have committed an unfair practice under the state law. The order was immediately served upon the employer which, upon finding the decision adverse, petitioned the board on October 16, 1948 for an opportunity to present further evidence. The petition did not state the nature of the further evidence the employer desired to offer, nor did it make any reference to the federal question now sought to be raised (R. 114-115).

On October 25, 1948 the board conducted a further hearing to determine whether the proposed evidence was of a nature which its statutory authority would permit it to consider[1].

Upon ascertaining at the hearing that the employer did not seek to introduce newly discovered evidence, but only data which had been in its possession before the proceedings were commenced, the board denied the petition as it was bound to do under the statutory limitations upon its authority.

The employer did not take any steps to seek review of the order of the state board, as it is authorized to do under the Wisconsin Statutes;[2] but neither did it obey the order. The board accordingly petitioned the circuit court of the county in which the employer transacts its business for the enforcement of its order.

The board's petition for enforcement was served upon the employer on December 30, 1948, and was noticed for hearing on February 2, 1949. The employer filed no answer, pleading, nor motion until January 26, 1949. It then

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[1]Under sec. 111.07 (6) of the Wis. Stats., the state board is authorized to modify an order after its issuance only "if it shall discover any mistake therein, or upon the grounds of newly discovered evidence."

[2]Sec. 111.07 (8) Wis. Stats.

served an order to show cause why the board's petition should not be dismissed on jurisdictional grounds, or why the board should not be directed to receive additional testimony. It is significant that service of this order was delayed until just two days after the period had expired, during which a charge of unfair practice might have been filed with the National Labor Relations Board.[3]

The circuit court of Ozaukee county heard arguments on February 5, 1949, and determined that the employer had not shown adequate grounds as required under the statute to permit reopening of the matter for further evidence.[4]

Upon appeal to the Supreme Court of Wisconsin the employer again sought to raise the issue that the state board had no jurisdiction because the matters involved were subject solely to the National Labor Relations Board.

The considerations of the Wisconsin Supreme Court, as well as those of the circuit court, are limited by statute to review of the record of the proceedings before the board.[5]

There was no evidence in the record made before the board on which the federal question could be decided. The petitioner sought to inject such evidence by affidavit filed with the circuit court. Such affidavit was no part of the record made before the board and it would not be evidence

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[3]Section 10 (b) of the Labor-Management Relations Act, 1949, 28 U. S. C. A. Supp. Sec. 160 (b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the board."

[4]Sec. 111.07 (7), Wis. Stats., provides that the court may grant leave to introduce additional evidence only "where such evidence appears to be material and reasonable cause is shown for failure to have adduced such evidence in the hearing before the board."

[5]See sec. 111.07 (7), Wis. Stats., and **Century Building Co. v. Wisconsin E. R. Board,** (1940) 235 Wis. 376, 291 N. W. 305.

in any event, but rather in the nature of a self-serving statement.

The supreme court of the state, therefore, based its decision on the premises that the record may be made before the board supported its order, and that the employer had not met the statutory conditions precedent to having the matter reopened before the board for further hearing. The pertinent parts of the decision showing the basis of the state court's decision are set out below.*

JURISDICTION

The petitioner has invoked jurisdiction under Title 28 U. S. C. A. sec. 1257. It is the position of the respondent that this petition does not invoke the jurisdiction of the United States Supreme Court for two reasons.

(1) The decision of the Wisconsin supreme court was not based upon a federal question, and a determination of such question was not necessary to the disposition of the matter.

(2) The petitioner by its conduct has waived whatever right it might otherwise have had to review of such a question.

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*"• • • In this case, the record shows that the company is a Wisconsin corporation, conducting its manufacturing operations in Wisconsin, with Wisconsin employees. There is nothing in the record to indicate that the National Labor Relations Board had ever accepted or attempted to exercise jurisdiction in a matter affecting the company or its employees, or that any petition has ever been filed requesting it to so act. • • •

"• • •

"• • • It [the petitioner] also sought to show through its president that it was engaged in selling most of its product in interstate commerce and that it bought a high percentage of its materials and supplies from out-of-state sources. This evidence was also available at the time of the hearing before the board, and no reasonable cause was shown for failure to introduce it at that time. From the record we find that the court did not abuse its discretion in holding as it did."

QUESTIONS PRESENTED

The questions set out at page 8 of the brief in support of petition for certiorari are the ones which it sought to raise after completion of trial on the merits, but which the state courts could not decide because the petitioner had failed to place them in the record in the manner required by statute.

The real issue is:

May an employer proceed through a complete hearing before a state agency on the merits of an unfair labor practice charge, without asserting or offering any evidence to indicate that its operations were subject to regulation by the National Labor Relations Board; and wait until after an adverse decision by the state agency to challenge state jurisdiction, when any right the employees might have had to apply for a remedy under the federal law expired during the proceedings?

ARGUMENT

I. The Wisconsin Supreme Court did not, and could not, decide a Federal Question, because it was limited to Review of the Record made before the State Board; and Such Record did not involve a Federal Question

Under the statutes of Wisconsin the functions of the court in a proceeding for enforcement of an order of the Wisconsin Employment Relations Board are limited to review of the record. If the board's findings are supported by the record they are conclusive.[7]

The court, as well as the state board and the parties to this proceeding, are governed by the statutory requirements with respect to introduction of the evidence in a proceeding before a state agency. It was on the ground that the employer did not meet the statutory requirements that the state board held it could not augment the record after decision on the merits, so as to present new issues. With respect to the evidence which the employer sought to introduce after decision on the merits, the state court said:

> "This evidence was also available at the time of the hearing before the board, and no reasonable cause for failure to introduce it was shown at that time."

Showing reasonable cause for failure to introduce evidence at the original hearing is a statutory condition precedent to obtaining permission to introduce it later.

If the entire subject matter, as shown by the record, were wholly outside the jurisdiction of the state board,

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[7]Sec. 111.07 (7), Wis. Stats., **Century Building Company v. Wisconsin E. R. Board**, (1940) 235 Wis. 376, 291 N. W. 305; **Appleton Chair Corp. v. United Brotherhood**, (1941) 239 Wis. 337, 1 N. W. 2d 188.

a different question might be presented; but where a tribunal unquestionably has some jurisdiction over the subject matter and a party seeks to establish that the facts of a particular case do not fall within the general jurisdiction the issue must be raised as an affirmative defense. Such a case does not involve a *want* of jurisdiction of the subject matter, but rather the *limits* of jurisdiction.

This is a case such as was described in *Dred Scott v. Sandford,* (1856) 60 U. S. 393, 401, 19 Howard 393, 15 L. ed. 691, in which it was said that courts of states which have adopted common law rules:

> "* * * are presumed to have jurisdiction, unless the contrary appears. No averment in the pleadings of the plaintiff is necessary, in order to give jurisdiction. If the defendant objects to it, he must plead it specially, and unless the fact on which he relies is found to be true by a jury, or admitted to be true by the plaintiff, the jurisdiction cannot be disputed in an appellate court."

See also, *Greeley v. Lowe,* (1894) 155 U. S. 58, 39 L. ed. 69, 15 S. Ct. 24; *Brown, Bonnell and Co. v. Lake Superior Iron Co.,* (1890) 134 U. S. 530, 33 L. ed. 1021, 10 S. Ct. 604.

The situation is the same with respect to a state's jurisdiction over unfair labor practices. The state unquestionably has some jurisdiction in that field, albeit limited, as is recognized in this court in *Alabama State Federation of Labor v. McAdory,* (1945) 325 U. S. 450, 464, 65 S. Ct. 1384, 89 L. ed. 1725, in which it is said that:

> "The National Labor Relations Act does not extend to all industries and all employees. It is only applicable to those employments in which strikes and labor disputes would affect interstate commerce, and

are found to be such by the National Labor Relations Board."

Similarly in *National Labor Relations Bd. v. Jones & Laughlin S. Corp.*, (1937) 301 U. S. 1, 32, 40, 57 S. Ct. 615, 81 L. ed. 893, the court said that the question is one of fact "to be decided as individual cases arise" whether a productive enterprise is of such a nature and extent that its labor disputes tend to obstruct commerce. Manufacturing, in itself, is not interstate commerce.

Parker v. Brown, (1943) 317 U. S. 341, 360, 63 S. Ct. 307, 87 L. ed. 315;

Department of Treasury v. Ingram-Richardson Mfg. Co., (1941) 313 U. S. 252, 85 L. ed. 1313, 61 S. Ct. 866;

Carter v. Carter Coal Co., (1936) 298 U. S. 238, 85 L. ed. 1160, 56 S. Ct. 855;

Schecter Poultry Corporation v. United States, (1935) 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837;

Oliver Iron Mining Co. v. Lord, (1923) 262 U. S. 172, 67 L. ed. 929, 43 S. Ct. 526;

Heisler v. Thomas Colliery Co., (1922) 260 U. S. 245, 67 L. ed. 237, 43 S. Ct. 83;

United Mine Workers of America v. Coronado Coal Co., (1922) 259 U. S. 344, 66 L. ed. 975, 42 S. Ct. 570;

Crescent Cotton Oil Co. v. State of Mississippi, (1921) 257 U. S. 129, 66 L. ed. 166, 42 S. Ct. 42.

Whether the operations of a particular manufacturing enterprise affect commerce so closely as to remove it from state control is a matter for affirmative proof in each case. See, for instance, *D. A. Schulte, Inc. v. Gangi,* (1946) 328 U. S. 108, 66 S. Ct. 925, 931, 90 L. ed. 1114, where it was said:

> "The burden of proof that rests upon employees to establish that they are engaged in the production of goods for commerce must be met by evidence in the record. * * *"

In *Warren-Bradshaw Drilling Co. v. Hall,* (1942) 317 U. S. 88, 90, 87 L. ed. 83, 63 S. Ct. 125, it was said:

> "The application of the Act depends upon the character of the employees' activities. * * * The burden was therefore upon respondents to prove that in the course of performing their services for petitioner and without regard to the nature of its business, they were, as its employees, engaged in the production of goods, within the meaning of the Act, and that such production was for interstate commerce. * * *"

In *Maitrejean v. Metcalfe Construction Co.,* (C. C. A. Minn. 1948) 165 F. 2d 571, 574, it was said:

> "It may well be that a timekeeper, a substantial portion of whose time is given to keeping the time of employees engaged in interstate commerce, is entitled to the protection of the Act, * * *. Even so, the burden is upon the employee to show that a substantial portion of his time was devoted to work within the protection of the Act * * *."

See, also:

Reed v. Murphey, (C. C. A. Miss. 1948) 168 F. 2d 257;

Maitrejean v. Metcalfe Construction Co., (C. C. A. Minn. 1948) 165 F. 2d 571;

Krill v. Arma Corporation, (D. C. N. Y. 1948) 76 F. Supp. 14;

Kelly v. Ford, Bacon & Davis, (D. C. Pa. 1946) 71 F. Supp. 311;

Snyder v. Dravis Corporation, (D. C. Pa. 1947) 6 F. R. D. 546;

Tinyes v. J. Rich Steers, Inc., (1947) 71 N. Y. S. 2d 684, 18 Misc. 106;

Baine v. J. S. Murphy, Inc., (1947) 70 N. Y. S. 2d 295;

Steinberg v. Steinberg, (1947) 249 Ala. 529, 32 So. 2d 209;

Blakeley v. Fresno Oil Co., (Tex. 1948) 208 S. W. 2d 902;

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Ullo v. Smith, (D. C. N. Y. 1945) 62 F. Supp. 757;

Damon v. Ford, Bacon & Davis, (D. C. Pa. 1945) 62 F. Supp. 446;

Harland Oil Co. v. Pattison, (1944) 153 P. 2d 622, 194 Okl. 570;

Johnson v. Gr. Nat. Life Ins. Co., (Tex. Civ. App. 1942) 166 S. W. 2d 935.

This is not a case in which the state board was wholly wanting in jurisdiction of the subject matter. It is such a case as was referred to in *Grignon's Lessee v. Astor,* (1844) 43 U. S. 319, 2 Howard 319, 11 L. ed. 283, in which it was held that a court has jurisdiction if, on a demurrer, it could

enter judgment in the plaintiff's favor. Certainly under that principle the state board had jurisdiction on the basis of the pleadings and the evidence before it.

As stated in *Binderup v. Pathe Exchange*, (1923) 263 U. S. 291, 44 S. Ct. 96, 68 L. ed. 308, there is a total want of jurisdiction only when the claim set out in the complaint is plainly without color or merit.

The situation in the case before the court is governed by the principles of *Western Indemnity Co. v. Rupp*, (1914) 235 U. S. 261, 35 S. Ct. 37, 59 L. ed. 220, in which it was held that a state may prescribe rules, with which a litigant must comply in order to avail himself of the right to object to jurisdiction. If he desires to contest the validity of the proceeding he must do so subject to the rules prescribed. In 235 U. S. 273 it is stated:

> "The Fourteenth Amendment declares that no State shall 'deprive any person of life, liberty, or property, without due process of law.' This prohibition has regard not to matters of form, but to substance of right. Since its adoption, whatever was the rule before, a non-resident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceeding as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. *Pennoyer v. Neff*, 95 U. S. 714, 732, 733; *York v. Texas*, 137 U. S. 15, 21. *But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the State to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the*

merits, if the objection raised to its jurisdiction over his person shall be overruled. This prevents a defendant from doing what plaintiff in error has attempted to do in the present case, that is, to secure, if possible, the benefit of a binding adjudication in its favor upon the merits, through the exercise of the court's jurisdiction, while depriving its adversary of any possibility of success by reserving an objection to the jurisdiction of the court to render any judgment against it. As appears from *Southern Pacific Co. v. Denton,* and other cases of the same class above cited, the distribution of original and appellate jurisdiction in the Federal courts is such as to sometimes give an advantage of this kind to defendants; but it is not indispensable to 'due process of law.' " (Emphasis supplied)

The same situation is involved in the instant case. The statutes of Wisconsin provide that a party participating in a proceeding upon the merits offer all the evidence on which he expects to rely, unless there is reason why he can not do so. The purpose of the statutes is substantially the same as the rule upheld in the foregoing case: to prevent one party from attempting to obtain a binding adjudication on the merits in his favor through the exercise of the state agency's jurisdiction, while depriving the other party of the possibility of protecting its rights by failing to disclose the defense upon which he expects to rely if defeated on the merits.

II. Where the decision of a State Court is based on a Non-federal Question, it is not Reviewable

The general rule is stated in *Southwestern Bell Tel. Co. v. Oklahoma,* (1938) 303 U. S. 206, 212-213, 58 S. Ct. 528, 82 L. ed. 751:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure v. Gaillard,* 127 U. S. 216, 234; *Johnson v. Risk,* 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co. v. Skinner,* 139 U. S. 293, 295, 297; *Whitney v. California,* 274 U. S. 357, 360, 361; *Lynch v. New York,* 293 U. S. 52, 54."

This rule has been so regularly followed that exhaustive citations would require more space than is practical here. Many cases are listed in 28 U. S. C. A. §344, note 41.

The rule has also been regularly followed that, if the decision of the highest court of a state rests primarily on a non-federal ground, the decision will not be reviewed even though the court also decided a federal question erroneously. See *Arkansas S. R. Co. v. German Nat. Bank,* (Ark. 1907) 207 U. S. 270, 275, 28 S. Ct. 78, 79, 52 L. ed. 201 in which it is said:

> "But according to the well-settled doctrine of this court with regard to cases coming from state courts, unless a decision upon a Federal question was

necessary to the judgment, or in fact was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no Federal question, the same result must follow, as a general rule. Moreover, ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong. * * *"

Application of the rule was made in *Consolidated Turnp. Co. v. Norfolk & O. V. R. Co.*, (Va. 1913) 228 U. S. 596, 33 S. Ct. 605, 57 L. ed. 982 where the court said:

"* * * If it also appears that the judgment of the state court against the plaintiff in error was based upon a question of general law broad enough to support the decision, this court will not consider the Federal question, though it was considered and determined by the court below adversely to the plaintiff in error. * * *"

An application of the rule under circumstances similar in principle to the ones involved in this case was made in *Enterprise Irrigation Dist. v. Farmers Mutual Canal Co.*, (Neb. 1917) 243 U. S. 157, 37 S. Ct. 318, 61 L. ed. 644 in which the state court made a decision adverse to the plaintiff in error with respect to contentions based on the 14th amendment, but said that even if the other question had been decided differently the defendant in error was entitled to prevail on the ground that his adversaries were estopped by their own conduct. The court there said:

"Concisely stated, the assignments of error complain that the Supreme Court infringed the due pro-

cess and equal protection provisions of the Fourteenth Amendment, first, by giving decisive effect to the state board's decision, instead of holding that it was made without lawful notice or opportunity to be heard and therefore was void, and, second, by misconceiving or misapplying the statute and common law of the State in disposing of other questions.

"Our jurisdiction is disputed and must be considered, as, indeed, it should be, even if not challenged. As has been shown, several questions were presented to the Supreme Court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the Fourteenth Amendment, and another was whether the defense of estoppel *in pais* was well grounded. The first was plainly a federal question and the other as plainly non-federal. Both were resolved in favor of the canal company. The other questions, none of which was federal, may be put out of view in this connection. Thus we are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it."

III. No Federal Question can be Raised on the Basis of Facts not shown in the Record under review by the State Court

The Supreme Court of Wisconsin was limited under the statutes and judicial policies of this state to reviewing the record in the proceedings before the Wisconsin Employment Relations Board. That record did not show facts upon which a federal question could be based. The situation is similar to that in *Clark v. Pennsylvania,* (1888) 128 U. S. 395, 9 S. Ct. 113, 32 L. ed. 487, in which review was sought on the contention that rights under the United States Constitution were violated by refusal to give certain instructions to the jury. The court held that, in the absence of anything in the record to show that the requested instructions were based upon evidence, there could be no review of the federal question. Without such evidence in the record, the court could not decide whether the refusal to give the requested instructions amounted to a ruling upon, and denial of, the federal rights asserted.

The decision of the court below was limited to review of a record containing neither a submission of a federal question nor evidence upon which it could be based. Under such circumstances an adverse decision on a federal question is not shown. Such a showing is an absolute prerequisite to review under the code.

IV. Petitioner has Waived its Right to bring a Federal Question to this Court by its Conduct through which its Employees have lost their Opportunity to Pursue a Federal Remedy, if any Existed

The gist of a petitioner's claim is that the action against it should have been brought before the National Labor Relations Board instead of before the Wisconsin Employment Relations Board. If its contentions were sustained, the result would be to give its acts immunity from both state and federal law.

The petitioner participated throughout the entire proceedings before the state board upon the merits, and made no claim that it was in the wrong forum until after an adverse decision. Even after the state board denied the employer's petition to reopen the case for further evidence (which the board was bound to do because of its limited statutory authority), the employer took no steps to have the action reviewed as it might have done under the state statutes. After the board commenced action to enforce its order, the petitioner refrained from challenging its jurisdiction for approximately a month, until after the time had expired under which a complaint could have been filed with the National Board.

It is stated in 2 Am. Jur. 969 that a party's rights to review "may be waived * * * by his own acts or conduct."

In support of the rule, there is cited the case of *Western Indemnity Co. v. Rupp,* (1914) 235 U. S. 261, 59 L. ed. 220, 35 S. Ct. 37, in which it was held that one who proceeded to trial upon the merits without raising a jurisdictional question in the manner provided by state law could not obtain review by the U. S. Supreme Court of a federal

question arising in connection with the jurisdiction of the first tribunal.

Respectfully submitted,

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